

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PETER FASANYA	:	CIVIL ACTION
	:	
v.	:	
	:	
ALLSTATE INDEMNITY COMPANY	:	NO. 00-2068

MEMORANDUM AND ORDER

BECHTLE, J. December , 2000

Presently before the court are defendant Allstate Indemnity Company's ("Allstate") Motion for Summary Judgment and motion to file a reply memorandum, and plaintiff Peter Fasanya's ("Fasanya") oppositions thereto. For the reasons set forth below, the court will grant the motions.

I. BACKGROUND

Sometime before May 2, 1998, Fasanya purchased an automobile insurance policy from Allstate through insurance agent Michael Zirolli. (Compl. ¶ 3.) The policy became effective on May 2, 1998.¹ Id. ¶ 5. On May 13, Allstate sent Fasanya a bill indicating a minimum amount due of \$161.09. (Linda Sisson Aff. Ex. A.) On June 13, when no payment was received, Allstate sent Fasanya an Automobile Cancellation Notice for Non-Payment of Premium. Id. ¶¶ 3-4 & Ex. B. The Cancellation Notice stated that the minimum amount due was \$327.18.² (Fasanya Aff. ¶3; Sisson Aff. Ex. B.) It also stated: "The insurance afforded

¹ All dates are 1998, unless otherwise noted.

² That amount included the \$161.09 that was past due from the May 13 invoice. (Sisson Aff. Ex. B.)

under your policy will be canceled if we do not receive the **Minimum Amount Due** before the **Cancel Date and time of: 12:01 a.m. Standard Time on July 2, 1998.**" (Sisson Aff. Ex. B; Fasanya Aff. ¶ 3.)

On July 1, 1998, Fasanya's wife filled out the payment stub from the cancellation notice and mailed \$200.00, less than the minimum amount due, to Allstate. (Fasanya Aff. ¶ 5; Sisson Aff. Ex. C.) On July 3, Allstate received this payment. (Sisson Aff. ¶ 6.) Also on July 3, Allstate sent an Automobile Insurance Special Notice to Fasanya, which stated:

Please be advised that your cancellation effective date is/was 12:01 a.m. on July 2, 1998.
Your payment of \$200.00 was received on July 3, 1998.
This amount has been applied to your policy; however, as of the date of this notice, we still have not received the full minimum amount due. Please note that the Cancellation Notice previously sent to you on June 12, 1998 will be enforced unless the full Minimum Amount Due is received on or before July 2, 1998.
In order to avoid having your policy cancel, we must receive an additional payment of \$132.18 before 12:01 a.m. on July 2, 1998.
Otherwise, your policy will terminate according to the Cancellation Notice we previously sent you.
The amount due includes a payment fee of \$5.00.
If you have any questions, please contact your agent.

(Sisson Aff. Ex. D; Fasanya Aff. ¶ 7.)

On July 11, Fasanya was involved in an automobile accident. (Compl. ¶¶ 8-9.) On July 13, Fasanya mailed the remaining payment of \$132.98, which Allstate received on July 16. (Fasanya Aff. ¶ 10; Sisson Aff. ¶ 10 & Ex. E.) On July 23, Fasanya notified Allstate of the accident. (Robert Edwards Aff. at ¶ 3.) Allstate did not provide coverage and Fasanya alleges that

Allstate denied benefits in bad faith.

Fasanya filed his Complaint in the Court of Common Pleas of Philadelphia County. Because the federal courts have original subject matter jurisdiction based on diversity of citizenship, 28 U.S.C. § 1332, Allstate removed the action to this court on April 20, 2000. On June 29, 2000, Allstate filed the instant motion for summary judgment. On July 20, 2000, Fasanya filed his response. On July 27, 2000, Allstate filed a motion for leave to file a reply.³

³ Fasanya asserts that the court does not have jurisdiction to decide the instant motion. (Pl.'s Mem. of Law in Opp'n to Def.'s Mot. for Leave to File Reply to Opp'n to Mot. for Summ. J. ("Pl.'s Opp'n to Reply") at 6.) He is mistaken. His assertion may spring from the fact that, on June 30, 2000, Fasanya filed a motion for leave to amend his Complaint and permit joinder of Zirolli, a non-diverse defendant. Fasanya asserted, inter alia, that he sought to join Zirolli because Zirolli's alleged statements regarding whether Fasanya's policy lapsed adversely impacted Fasanya's opportunity to settle his claim with Allstate. (Am. Compl. ¶ 42-43 & 49-50.)

However, this case was properly removed. Under 28 U.S.C. § 1447(e): "[i]f after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder or may permit joinder and remand the action to the state court." A court "faced with an amended pleading naming a new nondiverse defendant in a removed case, should scrutinize that amendment more closely than an ordinary amendment." Hensgens v. Deere & Co., 833 F.2d 1179, 1181 (5th Cir. 1987). A trial court "should look with particular care" at a plaintiff's motive in joining a defendant in removal cases "when the presence of a new defendant will defeat the court's diversity jurisdiction and will require a remand to the state court." Clinco v. Roberts, 41 F. Supp. 2d 1080, 1083 (C.D. Cal. 1999) (citing Desert Empire Bank v. Ins. Co. of N. Am., 623 F.2d 1371, 1376 (9th Cir. 1980)). According to the Third Circuit, "the grounds that could justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997).

On December 14, 2000, however, Fasanya withdrew his

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II. LEGAL STANDARD

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute is material only if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Whether a genuine issue of material fact is presented will be determined by asking if "a reasonable jury could return a verdict for the non-moving party." Id. In considering a motion for summary judgment, "[i]nferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992) (citation omitted).

III. DISCUSSION

Under Pennsylvania law, an insurer may cancel an insurance

³(...continued)

Motion to Amend the Complaint and Permit Joinder (Doc. # 9). Consequently, the following motions will be denied as moot: Allstate's Motion to Strike Plaintiff's Unauthorized New and Materially Different Version of His Proposed Amended Complaint Improperly Attached to Plaintiff's Reply to Motion for Amendment and Joinder (Doc. # 14) and Fasanya's Motion to File a Reply to Opposition to Motion for Amendment and Joinder (Doc. # 17).

policy when the insured fails to pay his premium. 40 Pa. Cons. Stat. Ann. § 1008.4(1).⁴ Where there is no valid policy in force, the insurer owes no duty to a person claiming benefits. Panizzi v. State Farm Mut. Auto. Ins. Co., 386 F.2d 600, 606 (3d Cir. 1967). Thus, when an insurance policy lapses for nonpayment and is subsequently reinstated upon receipt of payment, an insurance company is not liable for loss that occurs during the lapse. Shifalacqua v. CNA Ins., 567 F.2d 1255, 1257 (3d Cir. 1977) (stating that "[w]here a premium payment is 'received after the loss . . . the acceptance of it merely reinstate[s] the policy as of the date of its receipt'" (citation omitted); Panizzi, 386 F.2d at 606 (same); Holland v. Federal Kemper Ins. Co., 553 A.2d 450, 451 (Pa. Super. Ct. 1989) (stating that "insurance company at any time may cancel an insured's policy for lack of timely payment until such time [as] the balance is paid in full").

Allstate asserts that when Fasanya failed to pay the minimum amount on the date it was due, his policy lapsed. Allstate states that, as indicated in the Cancellation Notice, it canceled Fasanya's policy on July 2, 1998. (Sisson Aff. ¶ 9.) Allstate asserts that it reinstated Fasanya's policy on July 16, 1998,

⁴ This code section was effective during the period at issue. The Pennsylvania legislature repealed this section as of June 17, 1998 (effective in 60 days) and replaced it with a virtually identical provision, 40 Pa. Cons. Stat. Ann. § 991.2004(1).

when it received Fasanya's payment.⁵ Id. ¶¶ 10 & 12. Thus, Allstate asserts that Fasanya was not covered on July 11, 1998, the date of the accident.

The undisputed facts show that Allstate timely sent a cancellation notice on June 13, 1998.⁶ (Fasanya Aff. ¶¶ 3-4 & 7; Sisson Aff. ¶ 4 & Ex. B.) The record also shows that Fasanya did not pay the minimum amount due by July 2, 1998, the time listed in the cancellation notice. Rather, Fasanya returned the cancellation notice with an inadequate payment that Allstate received on July 3, 1998. (Fasanya Aff. ¶ 5; Sisson Aff. ¶ 6 & Ex. C.) Allstate did not receive the remaining portion of the minimum payment until July 16, 1998. (Fasanya Aff. ¶ 10; Sisson Aff. ¶ 10 & Ex. E.)

The record also shows that, on July 3, when Allstate received Fasanya's inadequate payment, it sent an Automobile

⁵ On July 16, 1998, Allstate asserts that it sent Fasanya an Automobile Reinstatement Notice indicating that his policy had canceled effective July 2, 1998 and was reinstated July 16, 1998. (Sisson Aff. ¶ 13 & Ex. F.) Fasanya denies receiving such a notice. However, Fasanya does not deny that on August 13, 1998, Allstate sent him an Automobile Insurance Bill reflecting a premium credit of \$72.50, the pro-rated premium during the period of lapse, bearing a transaction date of July 17, 1998. See Sisson Aff. ¶ 14 & Ex. G (attaching bill).

⁶ To be entitled to cancel a policy for non-payment of premiums, the insurer must mail a cancellation notice to the insured 15 days before the date of cancellation. 40 Pa. Cons. Stat. Ann. § 1008.5 (repealed June 17, 1998 and replaced with virtually identical provision, 40 Pa. Cons. Stat. Ann. § 991.2006(2)).

Insurance Special Notice to Fasanya.⁷ (Sisson Aff. ¶ 6 & Ex. D.)

The notice stated:

Please be advised that your cancellation effective date is/was 12:01 a.m. on July 2, 1998.
Your payment of \$200.00 was received on July 3, 1998. . . .
Please note that the Cancellation Notice previously sent to you on June 12, 1998 will be enforced unless the full Minimum Amount Due is received on or before July 2, 1998. . . .

(Sisson Aff. Ex. D.)

Fasanya asserts that he interpreted the following language as an offer of uninterrupted coverage if he paid his premium within a reasonable amount of time:

In order to avoid having your policy cancel, we must receive an additional payment of \$132.18 before 12:01 a.m. on July 2, 1998.
Otherwise, your policy will terminate according to the Cancellation Notice we previously sent you.

(Pl.'s Mem. of Law in Opp'n to Summ. J. at 4; Fasanya Aff. ¶¶ 7-8.) He asserts that because the Special Notice asked for an impossibility, i.e., because he received the notice on July 7, 1998 and it required payment of the minimum amount due before 12:01 a.m. on July 2, 1998, he had a reasonable amount of time to pay the amount due and that, in the interim, his policy would be in force. (Fasanya Aff. ¶¶ 7-8.)

However, the law is clear that the "acceptance of partial payment for premiums due does not operate as a waiver of the

⁷ Fasanya no longer denies receipt of the notices sent by Allstate. Compare Compl. ¶ 6 (stating that Allstate did not send Fasanya notice) with Fasanya Aff. ¶¶ 3-4, 7 & Pl.'s Opp'n to Reply at 4 (stating that Fasanya received "not one, but two notices").

insurance company's right of forfeiture for lapse of premiums." Holland, 553 A.2d at 451. Further, "[d]uring the interval between lapse and the tender of late payment, the insured can in no way rely on the company's subsequent acceptance of his payment." Shifalacqua, 567 F.2d at 1257.

The court finds that on July 2, 1998, Allstate canceled Fasanya's policy upon nonreceipt of his premium. (Sisson Aff. ¶¶ 3-4 & 9.) On July 16, 1998, when Fasanya paid the minimum amount due, Allstate reinstated his policy with a lapse in coverage from July 2, 1998 to July 16, 1998. Id. ¶ 12. Thus, the court concludes that the policy was not in effect on July 11, 1998 when Fasanya had his accident.

The court also finds that Fasanya cannot make out a claim for bad faith. To establish such a claim, a claimant must prove by clear and convincing evidence that the insurer lacked a reasonable basis for denying coverage and knew or recklessly disregarded its lack of a reasonable basis.⁸ Adamski v. Allstate

⁸ Pennsylvania's bad faith statute states:

In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:

- (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
- (2) Award punitive damages against the insurer.
- (3) Assess court costs and attorney fees against the insurer.

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Ins. Co., 738 A.2d 1033, 1036 (Pa. Super. Ct. 1999) appeal denied, Goodman v. Durham, 759 A.2d 387 (Pa. June 29, 2000). Bad faith on the part of an insurer is "any frivolous or unfounded refusal to pay proceeds of a policy." Jung v. Nationwide Mut. Fire. Ins. Co., 949 F. Supp. 353, 356 (E.D. Pa. 1997) (citations omitted); see Adamski, 738 A.2d at 1036 (stating same). Thus, "to determine whether a claim of bad faith has merit, one must look at the behavior of the insurer toward the insured and measure its reasonableness." Nelson v. State Farm Mut. Auto. Ins. Co., 988 F. Supp. 527, 532 (E.D. Pa. 1997).

Here, Allstate timely mailed a cancellation notice, did not receive the minimum payment due and relied on the regulations that allowed it to cancel Fasanya's policy. Allstate had a basis on which to deny Fasanya's claim, as Fasanya failed to make the minimum payment under his insurance policy. Where a policy is canceled and subsequently reinstated, the claim for bad faith must fail. Seckel v. Minnesota Mut. Life Ins. Co., No.CIV.A. 99-2834, 2000 WL 233246, at *5 (E.D. Pa. March 1, 2000) (granting summary judgment because plaintiff cannot establish bad faith count where claim was denied due to nonpayment of premium). The absence of a duty to provide coverage during a lapse precludes a finding of bad faith. Because Allstate canceled and reinstated Fasanya's policy, he was ineligible for coverage on the date of the accident. Further, in light of the evidence in front of

⁸(...continued)
42 Pa. Cons. Stat. Ann. § 8371.

Allstate when it made its coverage decision, it cannot be said that Allstate lacked a reasonable basis for denying coverage.⁹

Plaintiff asserts that summary judgment cannot be granted because discovery is not complete. (Pl.'s Mem. of Law in Opp'n to Def.'s Mot. for Summ. J. at 1.) The court notes that discovery in this case ended several months ago, on October 2, 2000. No extensions were sought. Fasanya filed his own motion for partial summary judgment on October 23, 2000. There is, moreover, "no genuine issue as to any material fact" before the court and Allstate is entitled to judgment as a matter of law.¹⁰

⁹ The alleged statement by Esther Egbert to Fasanya's counsel does not create a genuine issue of material fact as to Allstate's bad faith. Fasanya supports his argument that Allstate acted in bad faith by asserting that on July 30, 1999, Egbert, an Allstate claims adjuster, stated that company records did not show that Fasanya's policy lapsed. Pl.'s Mem. of Law in Opp'n to Summ. J. at 4-5, 19; Alex H. Pierre, Esq. Aff. ¶¶ 9-10 (attaching plaintiff's counsel's letter to Egbert). Nevertheless, Janet Young, the Allstate adjuster responsible for Fasanya's policy, advised him that the policy lapsed from July 2, 1998 through July 16, 1998. Pl.'s Mem. of Law in Opp'n to Def.'s Mot. for Summ. J. at 4 & Ex. B (attaching letter from Young and Allstate's activity sheets showing that Fasanya policy was canceled on 7/2/98 and reinstated on 7/16/98); Alex H. Pierre, Esq. Aff. ¶ 6 (same).

Fasanya also contends that Allstate's bad faith is evidenced by the fact that there is no copy of the reinstatement notice in his file. (Pl.'s Mem. of Law in Opp'n to Def.'s Mot. for Summ. J. at 2.) However, in July 1998, Allstate did not maintain hard copies of reinstatement notices. (Sisson Aff. ¶ 13.) Thus, the absence of a hard copy does not show bad faith.

¹⁰ The court notes that Fasanya failed to support his contention that additional discovery is needed. Fed. R. Civ. P. 56(f) (permitting court to continue motion for summary judgment where it appears "from the affidavits of a party opposing the motion that the party cannot for reasons stated present facts essential to justify the party's position"); Lunderstadt v. Colafella, 885 F.2d 66, 70 (3d Cir. 1989) (stating that failure
(continued...)

Fed. R. Civ. P. 56. Allstate is not liable for bad faith because it was entitled to cancel Fasanya's insurance policy consistent with the notice of cancellation and thereafter reinstate that policy with a lapse in coverage until the date of payment.

IV. CONCLUSION

For the reasons set forth above, Defendant's motion for summary judgment will be granted.

An appropriate Order follows.

¹⁰(...continued)
to submit affidavit in support of Rule 56(f) precludes continuance); St. Surin v. Virgin Islands Daily News, 21 F.3d 1309, 1314 (3d Cir. 1994) (requiring that party opposing summary judgment identify with specificity what information is sought and how it would preclude summary judgment).

Additionally, Fasanya has failed to comply with discovery. He has failed to: provide Allstate with self-executing disclosures under Section 4:01 of the Civil Justice Expense and Delay Reduction Plan; answer Allstate's interrogatories and document requests; and file a Pretrial Memorandum and provide copies of his proposed trial exhibits in accordance with the Local Rules and this court's Orders. (Matthew S. Miner Aff. ¶ 2.)

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PETER FASANYA	:	CIVIL ACTION
	:	
v.	:	
	:	
ALLSTATE INDEMNITY COMPANY	:	NO. 00-2068

ORDER

AND NOW, TO WIT, this day of December, 2000, upon consideration of defendant Allstate Indemnity Company's ("Allstate") Motion for Summary Judgment (Doc. #8), plaintiff Peter Fasanya's ("Fasanya") opposition thereto, Allstate's Motion to File a Memorandum in Reply to Plaintiff's Opposition (Doc. # 13), and Fasanya's opposition thereto, IT IS ORDERED that said motions are GRANTED and the reply memorandum is hereby incorporated into the motion for summary judgment. Judgment is entered in favor of Allstate and against Fasanya on all counts.

IT IS FURTHER ORDERED that the following motions are DENIED AS MOOT: Allstate's Motion to Strike Plaintiff's Unauthorized New and Materially Different Version of His Proposed Amended Complaint Improperly Attached to Plaintiff's Reply to Motion for Amendment and Joinder (Doc. # 14); Fasanya's Motion to File Reply to Opposition to Motion for Amendment and Joinder (Doc. # 17); Allstate's Motion in Limine to Dismiss Plaintiff's Complaint or to Exclude Evidence (Doc. # 22); Fasanya's Cross Motion for Partial Summary Judgment (Doc. # 21); and Fasanya's Motion for Leave to File Reply to Opposition to Cross Motion for Summary Judgment (Doc. # 24).

LOUIS C. BECHTLE, J.